disclosed the reasons to the IRS during an audit years before the indictment and believed the revenue impact to the government was negligible or nonexistent. The IRS made no relevant change in the returns as a result of the audit. Before these transactions, Congress had amended Section 1374 of the Internal Revenue Code, 26 U.S.C. § 1374, with the amendments to be effective January 1, 1987. The transactions had been organized under the belief that the new Section 1374 would govern them. But the indictment was written in a way that made it impossible to determine what tax law had given rise to the claim of a conspiracy to impede a tax determination or collection or which entity's taxes were at issue, or which taxpayer or taxpayers has caused the alleged intended loss to the government. The indictment certainly did not put Tucker on notice that the indictment was based on the assumption that the conspiracy was intended to impede the collection of a tax that had been repealed a year earlier and which Tucker and his lawyers knew to have been repealed.

Thus in his motion and brief for bill of particulars filed January 8, 1998, Tucker asked "which entity's or person's income tax is at issue and the year for which such tax is owed." On February 5, 1998, a hearing was held on the motion. The OIC convinced the District Court that the identity of the entity whose taxes were purportedly impeded was "irrelevant." Disclosure of the information clearly would have led to Tucker's ascertainment that he was charged with conspiring to impede the IRS in the collection of a repealed tax. That, in turn, necessarily would have resulted in the OIC having to admit that the indictment was based on its misrepresentation of both the existence of the alleged tax law, the alleged tax loss and related alleged motive for the allegedly "sham" transactions.

The Court's ruling could not be the subject of an interlocutory appeal. As a result, Tucker was confronted with an imminent trial in which he had been denied information vital for his defense. Because of the alleged loss of over $3.5 million, a conviction would have triggered mandatory imprisonment of probably 41 to 51 months under the United States Sentencing Guidelines. Tucker was still in recovery from years of liver disease and from a liver transplant barely one year earlier. He was under heavy medication. Tucker was offered a plea agreement which would avoid the risk of imprisonment and the consequent difficulties in obtaining proper medical treatment. Thus, on February 20, 1998, although not knowing the specifics of the allegations, Tucker entered a plea of guilty to Count 3, the *Klein* conspiracy. In entering his plea, Tucker specifically stated that he did not agree with all the allegations of the OIC. He was not questioned as to what portions he disagreed. The other two counts were dismissed.

The admissions forming the basis on which Tucker entered his plea on February 20, 1998, were minimal, and, particularly considering the later revelations, insufficient to sustain a conviction. He said he had acted on advice of counsel. (R. 11, 2/20/98 hearing) He also said that he had agreed "to not disclose the contract of sale in the disclosure statement to the bankruptcy court .. and one of the purposes of the bankruptcy was to deal with tax issues." He stated that he did not agree with much of the OIC's recitation. (R. 25)

Tucker did not state that the September 1987 contract involving the sale was concealed from the IRS. Indeed, he has specifically asserted that it was disclosed to the IRS during an audit of the transaction in the early 1990s, and the

government had not denied that assertion. At the time of the plea, Tucker did not know, and indeed could not have known, that the indictment alleged a conspiracy to impede the determination and collection of a tax repealed more than one year prior to the taxable transaction. Tucker could not have known that the OIC had made legal and factual misrepresentations to the grand jury in order to obtain the indictment.

It was months after his plea that Tucker first learned that the OIC possibly had based its case on a theory that Tucker had violated Old Section 1374. Tucker then filed a Motion for Declaration of Applicable Law on August 21, 1998 in connection with the restitution proceeding in another effort to discover specifically the tax law which was purportedly the object of the alleged conspiracy and to declare (i) that Section 1374 as amended in 1986 ("New Section 1374") was the applicable law, (ii) that Old Section 1374 had been repealed prior to the transactions at issue and (iii) that the OIC had no basis for asserting the applicability of the Old Section 1374. As of that date, at the latest, the OIC was on notice of its potential error. Had the OIC admitted its error at that time, Tucker could have moved to withdraw his plea then.

The OIC responded to the Motion for Declaration of Applicable Law on September 18, 1998 and for the first time formally disclosed to Tucker and the Court that the loss alleged, and the calculation in the indictment, was based upon a conspiracy to impede the IRS from determining and collecting a tax otherwise due under Old Section 1374. But the OIC asserted that it was Tucker who was wrong about the law. The OIC made two arguments — both of which have now been recanted by the government: (i) that the 1986

amendments did not cover "S" corporations created prior to January 1, 1987 (such as Tucker's) and (ii) that it was only the 1988 amendments to Section 1374 that did bring such corporations within the coverage of the 1986 enactment.

The District Court required Tucker to present his evidence first, and he demonstrated that Old Section 1374 had been repealed with the enactment of the "built in gains" tax effective January 1, 1987. That court required no testimony or evidence from the OIC but instead relied on the representations of the OIC and declared Old Section 1374 to be the law applicable at the time of the transaction Tucker was sentenced to four years probation, a fine of $6,000.00, a $50.00 special assessment and, based on Old Section 1374, $1,000,000.00 in restitution. Tucker appealed the restitution order on the basis that Old Section 1374 had been repealed prior to the acts of the alleged conspiracy and was inapplicable. The OIC continued to assert the applicability of Old Section 1374.

In the meantime, at Tucker's request, the IRS began normal administrative proceedings to review the transaction, the applicable tax law and the corporate tax owed, if any. Since the case had not been initiated by either the IRS or the Department of Justice, that analysis previously had been made only by the OIC and its staff.

On July 3, 2000, the Eighth Circuit reversed the District Court. *United States v. Tucker*, 217 F.3d 950 (8th Cir. 2000) [*Tucker II*]. The Court left the issue of the applicable law in doubt. Although it agreed that Old Section 1374 may have been repealed, it did not comment on whether such repeal was a result of the 1986 Act or its subsequent 1988 amendments (or, even later regulations proposed in 1994 and

finalized in 1996 implementing the 1986 amendments). It found that the District Court had failed to give the OIC a chance to present any testimony in support of its position that Old Section 1374 was the governing law. The Court then directed that the OIC be offered an opportunity to present testimony from a "responsible official" of the IRS that Old Section 1374 would have been applied to the transaction by the IRS or alternatively, to present some other legal theory. The Court even suggested an alternative legal theory, perhaps assuming that the grand jury might have been presented such a scenario. Thus, at this crucial point neither Tucker nor the District Court knew whether the OIC's assertions as to the law applicable to the transactions were correct .

Following that ruling the District Court set a hearing for December 1, 2000, to allow the OIC to present testimony from an "appropriate official of the IRS" as to the applicable law. A few months prior to that hearing, the OIC learned that the IRS had made an internal preliminary determination that the 1986 law effective January 1, 1987 governed the transaction. The OIC sought to halt any further administrative proceedings by the IRS on the grounds that the case against Tucker was still "under prosecution."

On December 1, 2000, a representative of the OIC appeared and asserted that the OIC did not begin to question the accuracy of its legal interpretation until after Tucker was sentenced. ". . . once Mr. Tucker pled guilty and was sentenced, we had a question about what law applies" (R. 13) This had not been previously disclosed to Tucker or to the Court. The representative of the OIC S then admitted that in the week after October 2, 2000, he had received from "someone in the IRS'" a copy of a letter from the examining agent concluding that the "new law" applies. The OIC

admitted that he had not supplied that letter to Tucker pursuant to Tucker's request for materials encompassed by *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). (R. 16)

The District Court said that it lacked jurisdiction to order the IRS to make a determination, but that it would not enter a new restitution order until such as time as the IRS did make such a determination. An agreement was then reached in which the OIC agreed to halt its efforts to suppress a ruling by the IRS, and Tucker agreed to and did permit the OIC to submit evidence and argue its case for the application of Old Section 1374 at a hearing before an IRS case officer. The OIC appeared before the IRS case officer on March 6, 2001, with counsel for Tucker present and argued specifically and only that Old Section 1374 was the governing law at the time of the transactions and in the tax year at issue and that the loss at issue was a loss under Old Section 1374.

On May 23, 2002, the IRS case officer issued a notice of proposed deficiency which rejected the OIC's arguments as to the application of Old Section 1374 and finding the transaction governed by New Section 1374, as amended by the Tax Reform Act of 1986 and in effect January 1, 1987. Thus May 23, 2002, was the first date on which the IRS has announced an opinion on the tax law applicable to the transactions at issue, and was the first date on which Tucker had been advised that his understanding of the tax law had been correct all along.

On February 24, 2003, while the matter was still in IRS administrative proceedings and the restitution issue still pending on the docket of the District Court, Tucker filed a petition for relief under 28 U.S.C. § 2255 alleging:

- That the IRS's conclusion that Old Section 1374 was inapplicable to the transaction meant that the conspiracy alleged in the indictment was legally impossible, and therefore that Tucker was both factually and legally innocent of the conspiracy, and thus that his conviction violated Fifth Amendment due process guarantees.

- That the OIC committed a *Brady* violation by its refusal to disclose the theory — later demonstrated to be false and based on a law later shown to have been repealed — under which the indictment was obtained and the prosecution pursued.

- That because of the failure to provide proper notice of the true nature of the charge, Tucker's plea of guilty was not knowing and intelligent, a ground for relief cognizable under the doctrine expressed in *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604 (1998). In reply to the government's response, he also noted a Sixth Amendment ineffective counsel issue.

- That although there was no default of this claim, any default of the foregoing claims is excused by the cause and prejudice test or the actual innocence test. These provide a gateway for Tucker's substantive claims to be heard on their merits.

At this point, for the first time, the Department of Justice entered the case and filed a response stating that the petition was unripe; that the claim was procedurally defaulted; that a *Klein* conspiracy did not require knowledge about the tax consequences; that there was no *Brady* violation and that the guilty plea was voluntarily and intelligently entered. The

government also argued that Tucker was relying on "certain changes to the tax code enacted after the alleged offense, but which were retroactive under certain circumstances." (Resp. p. 2).

In its ruling against Tucker on his § 2255 petition, the District Court found that the extraordinary circumstances of the case rendered the petition timely; that the claims were procedurally defaulted; and that under *Klein* conspiracy doctrine Tucker could not be actually innocent because, the Court opined, knowledge of the correct law was not necessary to complete a *Klein* conspiracy. However, the District Court misapprehended Tucker's argument when it referred to Tucker relying on a "1986 amendment and a 1988 amendment to 26 U.S.C. § 1374" (Op. p. 9). This misapprehension enabled the District Court to say that Tucker's complaint could bear solely on restitution. The Court's order implicitly accepted the government's assertion—now recanted—regarding retroactivity (Resp. p. 2).

The District Court had also held that Tucker's claim was procedurally defaulted because "the government's theory of the case was known to defendant at least by the time his plea hearing was concluded. This forecloses any claim that the alleged *Brady* violation caused him not to raise the issue by way of motion to set aside his plea and/or in his appeal" (Op. p. 5). Although the government argued that the law was available to Tucker and he could have figured out OIC's error earlier, the government itself admits that it did not figure out the OIC's error until years after the plea hearing. The fact is that both the Independent Counsel for many years, and initially the Department of Justice, misstated the applicable law to the grand jury, to Tucker, to the District Court and to the Eighth Circuit.

The District Court erred perhaps because as late as the summer of 2003 when it responded to Tucker's § 2255 pleading, the government itself was still supporting the OIC position that Old Section 1374 law did govern Tucker's transaction, and that it was only the 1988 amendments that caused a reduced tax consequence. Thus, neither at the sentencing hearing nor during the preparation of the § 2255 petition itself did the District Court itself yet have "notice" that the OIC had used a repealed tax statute to indict and prosecute Tucker.

At the same time that it denied the § 2255 petition, the District Court scheduled a hearing on the restitution issue for December 10, 2003. In the § 2255 action, Tucker sought and was granted a certificate of appealability and proceeded with the appellate process. Tucker and the government then informed the Court of Appeals of the scheduling of this hearing and of the possibility that information pertinent to the appeal might be developed. The Eighth Circuit then held the appeal in abeyance. On September 30, 2003, the government filed a document entitled Government's Notice of Intent to Rely on Alternative Theory for Sentencing. In that pleading, the government finally admitted that New Section 1374 was applicable. This admission was reiterated in a stipulation filed on December 9, 2003.

At the hearing on December 10, 2003, the government also stipulated that the 1986 amendments as in effect on January 1, 1987 governed the transaction and that the maximum possible corporate tax loss to the government would be $125,429.88. It did not contest that Tucker might actually get a net refund. The 2003 admission by the government stands in stark contrast to the alleged $3.5 million of losses and multiple previous assertions of the OIC

and then the Department of Justice that Tucker was simply relying on changes to the tax code "enacted after his crime."

On March 19, 2004, while his appeal was in abeyance, Tucker filed a Motion under 28 U.S.C. § 2244 for Permission to File Rule 60 Motion in District Court. Eighth Circuit case law, objected to by Tucker, was that Rule 60 motions generally are to be deemed the equivalent of successive petitions and subject to the gatekeeping requirements of 28 U.S.C. § 2244. *Boyd v. United States*, 304 F.3d 813 (8th Cir. 2002). The Eighth Circuit denied Tucker's request without explanation. Tucker brought the gatekeeper issue to this Court by petition for certiorari, which was denied. *Tucker v. United States*, 125 S. Ct. 355 (2004). [This Court subsequently decided the interplay of Rule 60 and the gatekeeper requirement in *Gonzalez v. Crosby*, 125 S. Ct. 2641 (2005).]

The Eighth Circuit then reactivated and decided the appeal from the District Court's ruling. That Court held that Tucker was not actually innocent of conspiracy because the alleged basis for the conspiracy was a repealed tax law; that Tucker had defaulted the *Brady* issue by failing to raise it in direct appeal on the restitution issue in 2000; and that Tucker's claim that his guilty plea was not knowing and intelligent was without merit.

The court did not address the fact that Tucker had correctly believed that the built in gains tax was the applicable law at the time of the alleged transactions, that he had believed that little or nor revenue impact would occur to the government, or that the one fact not disclosed to the bankruptcy court was not admitted to have been material and was disclosed to the IRS during audit.

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD CORRECT THE EIGHTH CIRCUIT'S MISAPPLICATION OF *BOUSLEY v. UNITED STATES*, 523 U.S. 614 (1998), AND HOLD THAT CAUSE AND PREJUDICE AND ACTUAL INNOCENCE, THE TESTS FOR BOTH OF WHICH TUCKER CAN SATISFY, WILL EXCUSE PROCEDURAL DEFAULT FOR FAILURE TO RAISE TUCKER'S UNDERLYING CLAIMS ON DIRECT APPEAL. THE COURT SHOULD HOLD THAT TUCKER IS ENTITLED TO A HEARING ON HIS PETITION.

Tucker raised three interrelated issues in his petition to the District Court and on appeal to the Court of Appeals for the Eighth Circuit: That he is actually innocent of the *Klein* conspiracy to which he pled guilty; that the government committed a *Brady* violation by failing to disclose that its position on the applicable tax law thus affecting criminal liability was incorrect ; and that his plea was not "knowing and intelligent" as that term was encompassed by *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998). All of these issues implicate Tucker's due process rights under the Fifth Amendment.

On appeal, the Eighth Circuit held that Tucker's claim only went to the strength, and not the validity, of the government's case and that:

> We note that the flaw in this argument is not an issue of procedural default that may be cured by a showing of cause and prejudice or actual innocence. See generally Bousley v. United States, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828

> (1998). Rather, Tucker has failed to show that his guilty plea was invalid.

419 F.3d at 721-722.

Tucker submits that the Eighth Circuit had an improperly constricted view of the *Bousley* test as applied to the evidence in this case. This Court should grant certiorari to clarify *Bousley* and correct the Eighth Circuit's misapplication and hold that Tucker is entitled to a hearing to show cause and prejudice, actual innocence and that his guilty plea was not knowing and intelligent. Tucker submits that this case is worthy of certiorari review under Rule 10(c) of the Rules of the Supreme Court: "A United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Bousley dealt with the ramifications of this Court's decision in *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995), concerning the meaning of "use" of a firearm under 21 U.S.C. § 924(c)(1)'s prohibition of use "during and in relation to" a violent or drug offense. *Bailey* narrowed the interpretation of the statute from what most, if not all, of the various courts of appeals had adopted. Bousley, who had not raised the issue on direct appeal from sentencing, then filed a § 2255 petition seeking to vacate his guilty plea as not being knowing and intelligent.

In *Bousley*, this Court held that when a claim has not been raised on direct appeal, in order to obtain an evidentiary hearing, a § 2255 petitioner must excuse the default either by showing cause and prejudice or actual innocence. Bousley himself could not show cause because mere futility is not cause; however, this Court agreed that Bousley would be entitled to a hearing to show actual innocence.

In *Tucker*, the Court of Appeals appears to have collapsed the *Bousley* inquiries into one in which it merely determines, without a hearing, that Tucker was not actually innocent and therefore cannot show that the plea was not knowing and intelligent. This Court should correct this misunderstanding of *Bousley*.

The Eighth Circuit gave short shrift to Tucker's assertions of cause. *Bousley* had presented a fairly standard case of a defendant's failure to argue a matter not yet decided by the Supreme Court but which had percolated, generally adversely, through the courts of appeals. There was no external force preventing Bousley's pursuit of what later became known as a *Bailey* claim. Tucker's case, on the other hand, dealt with a circumstance where the government made major misrepresentations of law and fact to the grand jury, resisted motions which would have disclosed the misrepresentation before Tucker's plea and continued to make factually and legally erroneous representations case not only at that sentencing but for years thereafter. Furthermore, the Eighth Circuit itself in *Tucker II* opined that the government's position— later recanted— might be valid. Essentially that Court's position is that Tucker cannot establish cause to excuse the default because he did not raise the issue of government misrepresentation prior to the government's own admission of such misrepresentations. and that the defendant is precluded from a hearing on actual innocence because his plea of guilty.

This Court in *Banks v. Dretke*, 540 U.S. 668, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004), held that a defendant's reliance on false information provided by the prosecution

constitutes cause. The government's reliance on a false theory of conspiratorial liability is much closer to the *Banks* situation than the mere statutory interpretation question of *Bousley*. Prejudice, of course, would be established by both the fact that Tucker would not have entered the guilty plea and no reasonable jury would have convicted.

If the OIC was correct that Tucker's transactions could have been intended to or did impeded the IRS in determining a very large tax liability, Tucker's testimony that the transactions at issue had been targeted to other business issues (relating to a fraud against him by his co-defendant Marks) and were believed to have no relevant substantial revenue impact would likely be of no avail with a jury. However, if the OIC had misrepresented the existence if the tax and the loss to the grand jury, it is likely that the district court would have dismissed after completion of the government case and, in any event, not reasonable juror would have voted for conviction.

Moreover, the Eighth Circuit misapplied the actual innocence alternative. The Eighth Circuit's appears to have been concluded that under no circumstances can one be actually innocent of a *Klein* conspiracy even when the government's theory of the case is based upon a nonexistent tax. This Court has never held that, and indeed the Second Circuit has appeared to hold otherwise. *United States v. D'Agostino*, 145 F.3d 69 (2d Cir. 1998).

Assuming, *arguendo*, that the relevant part of § 2255's successor petition definition of "actual innocence" is the appropriate standard to define that term — "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no

reasonable factfinder would have found the movant guilty of the offense," — the Eighth Circuit should have interpreted the standard more holistically than merely invoking a mechanical rule that one is guilty of conspiracy when one attempts to lower his tax liability, even when the purported object of the conspiracy turns out to be based upon a fallacious interpretation of tax law and the Internal Revenue Service agrees with the defense's interpretation.

In this case, the evidence as a whole is such that no jury would have convicted Tucker of the *Klein* conspiracy. He would have been able to establish at a trial that the government's theory was dead wrong, that it was based upon a flat misrepresentation — either knowing or accidental. He also would have shown that he had substantial and legitimate non-tax-related business reasons for the transactions (specifically, to resolve a securities fraud situation of which Tucker had been the victim), retained independent tax and bankruptcy attorneys at the time of the transaction to ensure that his treatment of the transactions was proper and made a complete disclosure to the IRS, the agency he is alleged to have intended to impede. Even in its statement of the case at plea, the OIC never asserted that the IRS was not provided full disclosure of all relevant data. The reason is that the OIC was relying on the wrong law. Tucker should be permitted a hearing to demonstrate these matters.

The Eighth Circuit appears to have held that Tucker's admissions in the plea, such as they were, foreclose any attack on the plea. That is an erroneously broad rule, particularly under the circumstances of this case. Tucker specifically requested and was denied the information as to the alleged basis for the conspiracy. He was, at the time, a recent

liver transplant recipient and quite ill. The tax code is extraordinarily complex and there are many places where even the most conscientious taxpayer may make a mistake which an overaggressive prosecutor may mischaracterize as a criminal violation. Because of the care he had undertaken to properly treat the transactions and to disclose to the IRS , he was mystified when indicted. As a recent liver transplant recipient, when presented with a plea bargain which would assuredly keep him out of the mediocre hygienic conditions and medical care of prison — he agreed to plea. He had to struggle to find something to say to admit liability because he did not know what tax law could produce the result alleged and because he knew he had made disclosure to the IRS. All he could come up with was that he had not disclosed part of the transaction to a bankruptcy judge and that a purpose of bankruptcy was to deal with tax issues. The government case was presented to the grand jury and the indictment obtained by the OIC without participation by the IRS. Normally the IRS participation would have been required to assure conformity in tax law interpretation and enforcement. But that did not happen here.

Tucker never admitted to any misrepresentation to the IRS or any 'sham' transaction – as to the bankruptcy or anything else. He did admit that one contract had not been disclosed to the bankruptcy court. He did not admit that it was material to the proceedings and he asserted that contract was disclosed to the IRS. He asserted that little or no tax loss resulted to the government as a result of the transactions complained of, and that has now been established. Given all this no reasonable juror have believed that Tucker, knowing the correct law, and knowing the correct tax exposure, deliberately engaged in the extensive and complex transaction in order to save at most, a fraction of the cots of the transactions themselves.

Assuming Tucker can demonstrate cause and prejudice or actual innocence to the district court, he then is entitled to show that the plea was not knowing and intelligent. The answer to that is not complex: When a plea is based upon the false premise as to the elements of the offense, a defendant's plea is not knowing and intelligent.

Therefore, this Court should grant certiorari to correct the Eighth Circuit's interpretation of *Bousley* and hold that reliance on a false government theory is cause; that a plea to a *Klein* conspiracy is not automatic evidence of guilt even when the purported basis for the *Klein* conspiracy is erroneous and the defendant has been denied access to that fact; and that Tucker is entitled to an evidentiary hearing before a district court to establish these assertions.

CONCLUSION

Tucker respectfully prays that this Court grant certiorari, and that upon plenary briefing and argument, this Court reverse the decision of the Court of Appeals for the Eighth Circuit and remand for proceedings in accordance with this Court's rulings.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED AUGUST 16, 2005

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 03-3559.

Submitted: April 14, 2005.
Filed: Aug. 16, 2005.
Rehearing and Rehearing En Banc Denied
Oct. 21, 2005.*

UNITED STATES of America,

Plaintiff-Appellee,

v.

Jim Guy TUCKER,

Defendant-Appellant.

Before LOKEN, Chief Judge, FAGG and BYE, Circuit Judges.

LOKEN, Chief Judge.

Former Arkansas Governor Jim Guy Tucker pleaded guilty to conspiring to defraud the United States by impeding the assessment and collection of income tax in violation of

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* Judges Arnold, *Murphy*, and *Colloton* took no part in the consideration or decision of this matter.

18 U.S.C. § 371, a so-called Klein conspiracy. See United States v. Fletcher, 322 F.3d 508, 513 (8th Cir.2003). The plea agreement provided that Tucker's sentence would include a term of probation, a fine, and restitution based on Tucker's share of "the [tax] loss sustained by the United States as a result of the offense." At sentencing, the district court determined the tax loss to be in excess of $3.5 million, applying a prior version of the relevant Internal Revenue Code provision, 26 U.S.C. § 1374. Tucker appealed, arguing that the Internal Revenue Service would have applied the present version of § 1374 in determining his tax liability. We remanded for resentencing, concluding that the government had the burden to prove, and failed to prove, which version of the statute should be used in determining the actual tax loss to the victim of the offense for restitution purposes. United States v. Tucker, 217 F.3d 960, 965 (8th Cir.2000).

On remand, after the IRS agreed with Tucker that the present version of § 1374 applies, the parties stipulated that the tax loss for restitution purposes was $125,429.88. The district court then determined Tucker's restitution liability based on that actual loss. Meanwhile, Tucker moved the district court for post-conviction relief under 28 U.S.C. § 2255, arguing that the government based his prosecution on the wrong version of § 1374 and therefore he is actually innocent and the victim of a Brady violation and entitled to withdraw his guilty plea. The district court[1] denied the motion. Tucker appeals. We affirm.

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1. The HONORABLE STEPHEN M. REASONER, United States District Judge for the Eastern District of Arkansas. Judge Reasoner died August 14, 2004.

Appendix A

1. Tucker first argues that he is actually innocent of the offense because it was legally impossible to conspire to impede the collection of a non-existent tax, that is, a tax based on the former version of § 1374 that did not apply to the transaction in question. We disagree. Tucker pleaded guilty to Count 3 of the indictment, which charged the defendants with conspiring to impede the IRS in the collection of "income taxes." The essence of the charge was a conspiracy to avoid corporate-level tax on the profitable sale of the Plantation Cable System. See Tucker, 217 F.3d at 961-62. At the change of plea hearing, the district court read to Tucker the portion of Count 3 that alleged, "The purpose of the conspiracy was to transfer the Plantation cable system owned by PCS to defendant Jim Guy Tucker through a fraudulent bankruptcy proceeding in Texas that was designed to qqq avoid corporate tax on the sale of the system. . . ." After the Assistant U.S. Attorney stated in considerable detail the facts the government would prove if the case went to trial, the court asked Tucker to "summarize what acts that you did that you feel justify the fact qqq that you have decided to enter a plea of guilty." Tucker responded:

THE DEFENDANT: As the law has been explained to me, Your Honor, if we agreed, and I agree we did agree . . . to not disclose the contract of sale . . . in the disclosure statement to the bankruptcy [court] and one of the purposes of the bankruptcy was to deal with tax issues, that that is sufficient to constitute a charge under this conspiracy statute.

The court accepted Tucker's guilty plea, finding it to be "a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense."

As the colloquy at the change-of-plea hearing confirmed, the offense turned on the tax liability the conspirators and their tax advisors believed or feared would apply to the lucrative sale of the Plantation Cable System, not on the tax liability the IRS ultimately assessed after full disclosure and a tax audit. Tucker admitted that the purpose of the bankruptcy non-disclosure "was to deal with tax issues." Apparently, the conspirators intended to avoid the substantial corporate-level tax that would be owed if the former version of § 1374 applied. But even if Tucker operated on a misconception as to the provision of the Internal Revenue Code the IRS would ultimately apply, he was still guilty of conspiring to impede the IRS in collecting the income tax that would be owed on the sale of the cable system. In other words, Tucker's guilt under 18 U.S.C. § 371 turned on the purpose of the conspirators' non-disclosure. Determining which version of § 1374 the IRS would apply to the transaction only became relevant in calculating the amount of restitution owing to the government as victim of the Klein conspiracy. See Tucker, 217 F.3d at 963. Thus, Tucker's guilt and therefore his guilty plea were not undermined in the slightest by the subsequent IRS decision to apply the present version of § 1374.

2. Tucker next argues that his guilty plea must be vacated because the government violated Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), when it refused to disclose its incorrect reliance on the prior version of § 1374. This non-disclosure, he alleges, went "to the very heart of the case" and induced him to plead guilty. The district court rejected this claim because Tucker knew the government's theory of the case by the end of his plea hearing and failed to

raise this Brady issue on direct appeal, and because his knowing and intelligent guilty plea waived the issue. We agree. We also agree with the government that no Brady violation occurred.

3. Finally, Tucker argues that he is entitled to withdraw his guilty plea because it was not knowing and intelligent due to the government's failure to disclose "the true nature of the charge"-that the alleged conspiracy "was to violate a repealed [tax] law." This argument is without merit. As we have explained, Tucker's guilt did not depend on which version of § 1374 in fact applied to the transaction in question. Thus, any misapprehension at the time he pleaded guilty concerned only the strength of the government's case or the likely financial penalty if he was convicted. "A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." Brady v. United States, 397 U.S. 742, 757, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). We note that the flaw in this argument is not an issue of procedural default that may be cured by a showing of cause and prejudice or actual innocence. See generally Bousley v. United States, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). Rather, Tucker has failed to show that his guilty plea was invalid.

The order of the district court dated August 28, 2003, is affirmed. Tucker's motion to supplement the record on appeal is granted.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION FILED AUGUST 29, 2003

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. 4:95CR00117-001 SMR
No. 4:03CV00118

UNITED STATES OF AMERICA,

PLAINTIFF

vs.

JIM GUY TUCKER

DEFENDANT

ORDER

Presently before the Court is Defendant's Motion To Vacate Sentence Under 28 U.S.C. § 2255 (Doc. No. 341). The Government has filed a Response (Doc. No. 347), and Defendant has filed a Reply (Doc. No. 348). For the reasons stated below, the motion is denied.

Appendix B

Facts

The facts of this case, as described by the Eighth Circuit, are as follows:

> Former Arkansas Governor Jim Guy Tucker pleaded guilty to conspiracy to defraud the United States by impeding the assessment and collection of income tax in violation of 18 U.S.C. § 371. The plea agreement that Tucker's sentence would include a term of probation, a fine, and the payment of restitution based on Tucker's share of "the loss sustained by the United States as a result of the offense."
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> * * *
>
> We will briefly describe the complex transactions at issue, based upon fact statements in the PSR to which Tucker did not object, plus the sentencing hearing testimony of his long-time accountant. In 1987, Tucker and William Marks undertook a joint venture in the cable television business, agreeing to divide their profits equally. At the time, Marks owned 18% of Planned Cable Systems (PCS), a subchapter C corporation that owned several cable television systems. Tucker owned 100% of Cable Management Inc. (CMI), an Arkansas corporation that had elected subchapter S status in May 1985.* In June 1987,

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* Briefly stated, under the Internal Revenue Code, most incorporated businesses are subchapter C corporations, meaning that (Cont'd)

Marks and Tucker acquired the remaining shares of PCS from a third party for $6,000,000 and merged PCS into CMI, with Marks acquiring a 50% interest in CMI from Tucker.

One of PCS's businesses was Plantation Cable System, a Florida cable operator. In August 1987, an unrelated third party agreed to purchase Plantation's assets from CMI for $15 million. When advised that this transaction would realize substantial taxable gain, Tucker, Marks, and a tax attorney devised a series of sham transactions to minimize their tax liability. They reversed the PCS-CMI merger and transferred the PCS assets into LMS, falsely representing that Tucker's only interest in that corporation was as a substantial secured creditor. They then put LMS into bankruptcy. Aided by further misrepresentations to the bankruptcy court, they had the Plantation assets transferred to Tucker in exchange for his secured debt. In January 1988, tucker sold the Plantation assets to the unrelated buyer for $14.75 million. Tucker received $11.75 million of the purchase price, and Marks received $3 million in the form of non-complete payments. In his 1988 individual tax return filed in early 1989, Tucker claimed a stepped-up basis in the Plantation assets

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(Cont'd)

their activities are taxed at the corporate level. A subchapter S corporation is a qualified corporation that elects to have its business activities taxed only at the shareholder level. *See* 26 U.S.C. §§ 1361-1379.

> and paid tax on a reported capital gain of $4,466,977. CMI paid no corporate-level capital gains tax on the sale of the Plantation assets.

United States v. Tucker, 217 F.3d 960, 961-62 (8th Cir. 2000) (footnote in original). Defendant appealed the amount of restitution included in this Court's sentence. This Court's decision on that issue was reversed, and Defendant's case was remanded for the sole purpose of resentencing with respect to the amount of restitution.

Defendant now seeks, pursuant to 28 U.S.C. § 2255, to have this Court vacate his conviction and entire sentence. Defendant has three theories upon which he relies: 1.) that he is actually innocent of the crime to which he entered a plea of guilty; 2.) that before he entered his guilty plea, he was denied information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and 3.) that his plea was not knowingly, intelligently, and voluntarily entered. The Government disagrees with all three theories.

Ripeness

As a preliminary matter, this Court must first discuss whether Defendant's motion is premature. "Ordinarily resort cannot be had to 28 U.S.C.A. § 2255 or habeas corpus while an appeal from conviction is pending." *Masters v. Eide,* 353 F.2d 517, 518 (8th Cir. 1965). Other courts have phrased the test in the converse and held that "absent extraordinary circumstances, [a] district court should not consider § 2255 motions while a direct appeal is pending" because the disposition of the underlying case may render the motion

moot. *United States v. Robinson,* 8 F.3d 398, 405 (7th Cir. 1993). Defendant argues that there are extraordinary circumstances in this situation. The Government disagrees.

This Court must find that there are extraordinary circumstances in this case which warrant this Court considering this motion. First, as discussed in more detail below, Defendant has already had one direct appeal. He did not raise these issues in that appeal. While Defendant may ultimately appeal this Court's sentence of restitution again if any is ordered, he likely would not be allowed to raise these new arguments at that time. Therefore, any further direct appeal is unlikely to result in this motion becoming moot.

Second, Defendant's probation period ended shortly after he filed this motion. In order to obtain relief pursuant to 28 U.S.C. § 2255, the movant must be "in custody." 28 U.S.C. § 2255. A probationer is in custody for purposes of 28 U.S.C. § 2255. *Borre v. United States,* 940 F.2d 215, 217 n.2 (7th Cir. 1991). Furthermore, if the movant's term of probation ends while the motion is pending, he may still pursue relief because continuing injury is presumed. *See Spencer v. Kemna,* 523 U.S. 1, 11-12 (1998). Defendant's claims are considered to be in controversy at this time. However, were this Court to dismiss this motion as premature now, then, when it later became ripe, Defendant would no longer be able to seek relief because he would no longer be "in custody" for 28 U.S.C. § 2255 purposes. Therefore, this Court believes that Defendant's later inability to raise these claims to be an

extraordinary circumstance warranting consideration of them at this time.[1]

Procedural Default

The Government contends that Defendant's claims are procedurally barred. "It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *Mabry v. Johnson,* 467 U.S. 504, 508 (1984) (footnote omitted). Furthermore, "even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review . . . [because] [h]abeas review is an extraordinary remedy and will not be allowed to do service for an appeal." *Bousley v. United States,* 523 U.S. 614, 621 (1998) (internal quotation omitted). "Indeed, the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." *Id.* (internal quotation omitted).

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1. This Court considered holding this motion in abeyance until it became ripe. However, as discussed in a separate Order, while this Court plans to move ahead with Defendant's resentencing, final resolution of his underlying criminal case is likely still months, if not years, away. Regardless of this Court's decision on the restitution issue at the resentencing hearing, an appeal is likely by the disagreeing party (or both parties). Furthermore, a petition for a writ of *certiorari* could be sought after the Eighth Circuit reached a decision on any subsequent appeal. This is to say nothing of the underlying civil tax case which appears to be many months, if not years, from resolution. This Court does not believe it would be a wise use of judicial resources to allow this motion to languish for that long.

Appendix B

In the instant case, Defendant's only claim of error on appeal was that the restitution ordered by this Court was inadequately supported by the evidence and based on an incorrect interpretation of the tax laws. Each of Defendant's theories are based on Defendant's claims that his plea was based on a law which did not exist at the time of his actions. He claims that the fact that this law allegedly did not exist at the time of his actions makes it legally and factually impossible for him to have committed his crime. He also claims that his plea was invalid because the Government did not reveal the theory under which he was indicted in violation of *Brady v. Maryland,* 373 U.S. 83 (1963). He further claims that his plea was not knowing and intelligent because the Government did not reveal the theory under which he was indicted. Defendant's claims are unquestionably procedurally barred. At the very latest, Defendant knew the Government's theory of the case at the conclusion of his plea hearing. Even assuming that Defendant is correct that the Government was obligated to inform him of its legal theory, an assumption of which this Court is highly dubious, it does not explain why Defendant did not raise his claims in a motion to set aside his plea with this Court or in his appeal to the Eighth Circuit. This Court must find that Defendant's claims are procedurally barred.

Excusing Procedural Default

"Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" *Bousley*, 523 U.S. at 622 (internal quotation omitted).

Appendix B

Cause and Prejudice

Defendant asserts two possible "causes" for his default. First, he asserts that the aforementioned alleged *Brady* violation caused his default. This contention is without merit. As explained above, the Government's theory of the case was known to Defendant at least by the time his plea hearing concluded. This knowledge forecloses any claim that the alleged *Brady* violation caused him to not raise the issue by way of a motion to set aside his plea and/or in his appeal. The alleged *Brady* violation cannot excuse Defendant's default.

Second, Defendant asserts that his attorneys' failure to raise these issues on appeal amounts to ineffective assistance of counsel and was the cause of his default. The "process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray,* 477 U.S. 527, 536 (1986) (internal quotation omitted). This Court believes that Defendant's attorneys' failure to raise these issues was perfectly reasonable.

After this Court accepted Defendant's plea of guilty, the Government was allowed to dismiss the two other counts of the indictment pending against Defendant. At the sentencing hearing, the Court granted the Government's § 5K1.1 motion and gave Defendant a sentence of probation as requested by the Government. According to the Presentence Investigation Report, these actions reduced Defendant's exposure from a guideline range of forty-one to fifty-one months of

imprisonment to a sentence of probation. Far from being ineffective assistance, Defendant's attorneys' actions were no doubt based on their concern that Defendant would expose himself to substantial prison time if he raised these issues on appeal. Furthermore, while not relied on in reaching its decision on this point, the Court would point out that Defendant is a former attorney and never raised any objection to his plea at the time of his sentencing hearing or at any time prior to this motion. Ineffective assistance of counsel cannot excuse Defendant's default.

Actual Innocence

A defaulted claim "may still be reviewed in [a] collateral proceeding if [the movant] can establish that a constitutional error in his plea colloquy has probably resulted in the conviction of one who is actually innocent." *Bousley,* 523 U.S. at 623 (internal quotation omitted). "To establish actual innocence, [the movant] must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Id.* (internal quotation omitted). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Id.* "In other words, the Government is not limited to the existing record to rebut any showing that [the movant] might make[;] [r]ather . . . the Government [is] permitted to present any admissible evidence of [the movant's] guilt even if that evidence was not presented during [the movant's] plea colloquy. . . ." *Id.* "In cases where the Government has foregone more serious charges in the course of the plea bargaining, [the movant's] showing of actual innocence must also extend to those charges." *Id.*

Appendix B

Defendant claims he is actually innocent of the crime of which he was charged because it was legally and factually impossible for him to have committed it. As noted above, Defendant pleaded guilty to conspiracy to defraud the United States by impeding the assessment and collection of income tax in violation of 18 U.S.C. § 371. This crime is commonly known as a "*Klein* conspiracy." *United States v. Fletcher,* 322 F.3d 508, 513 (8th Cir. 2003) (citing *United States v. Klein,* 247 F.2d 908 (2d Cir. 1957)). "To convict a defendant of a *Klein* conspiracy, the government must show the existence of an agreement to defraud the IRS and an overt act by one of the conspirators in furtherance of the agreement's objectives." *Fletcher,* 322 F.3d at 513. Furthermore, a *Klein* conspiracy "need not result in a monetary loss to the federal government." *United States v. Anderson,* 579 F.2d 455, 458 (8th Cir.), *cert. denied,* 439 U.S. 980 (1978). One particular case is particularly instructive

> Conspiracy to Defraud the United States.
>
> The [defendants] argue that a conspiracy as described does not constitute a conspiracy to defraud the United States because there is no proof of gain to them and no proof of harm to the United States. Further, they claim no fraudulent behavior occurred in connection with this conspiracy.
>
> Initially, we note that the charge is conspiracy to defraud, not an actual defrauding. Second, the cases clearly establish that a conspiracy to defraud

the United States need not anticipate cheating the government out of property or money:

> To conspire to defraud the United Stated . . . also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention.

Hammerschmidt v. United States, 265 U.S. 182, 188, 44 S. Ct. 511, 512, 68 L. Ed. 968 (1924).

For example, *Dennis v. United States,* 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966), involved a conspiracy to submit false affidavits to the NLRB. The Court emphasized that section 371 "reaches 'any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government.'" *Id.* at 861, 86 S. Ct. at 1844 (quoting *Haas v. Henkel,* 216 U.S. 462, 479, 30 S. Ct. 249, 253, 54 L. Ed. 569 (1910)), *See also Lutwak v. United States,* 344 U.S. 604, 73 S. Ct. 481, 97 L. Ed. 593 (1953); *Haas v. Henkel,* 216 U.S. 462, 30 S. Ct. 249, 54

L. Ed. 569 (1910); *United States v. Anderson,* 579 F.2d 455 (8th Cir.), *cert. denied,* 439 U.S. 980, 99 S. Ct. 567, 58 L. Ed. 2d 651 (1978); *United States v. Hay,* 527 F.2d 990 (10th Cir. 1975), *cert. denied,* 425 U.S. 935, 96 S. Ct. 1666, 48 L. Ed. 2d 176 (1976); *United States v. Jacobs,* 475 F.2d 270, 283 (2d Cir.), *cert. denied,* 414 U.S. 821, 94 S. Ct. 116, 38 L. Ed. 2d 53 (1973). Anticipated pecuniary gain to the conspirators is also unnecessary.

The evidence must show a scheme to impair, obstruct, defeat or interfere with lawful governmental functions through fraudulent or dishonest means. The [defendants] argue there is no proof of such a scheme since all governmental work was performed.

In *United States v. Anderson,* 579 F.2d 455 (8th Cir.), *cert. denied,* 439 U.S. 980, 99 S. Ct. 567, 58 L. Ed. 2d 651 (1978), a judge, as financial officer of the county, approved his son's use of employees paid through federal Comprehensive Employment and Training Act (CETA) funds to perform some of the work on fencing projects the son performed on highway projects funded partially by the federal government.

The defendants there argued that there was no conspiracy to defraud since there was no interference with programs. A highway had been built for the cost anticipated, and workers had

> received federally funded employment as intended. The court rejected these arguments. "The defendants' actions . . . interfered with the government's interest in 'seeing that the entire project (was) administered honestly and efficiently and without corruption and waste.'" 579 F.2d at 458-59 (quoting *United States v. Hay,* 527 F.2d 990, 998 (10th Cir. 1975), *cert. denied*, 425 U.S. 935, 96 S. Ct. 1666, 48 L. Ed. 2d 176 (1976)). Similarly, in *Langer v. United States*, 76 F.2d 817 (8th Cir. 1935), the court approved an indictment charging the Governor of North Dakota and others of conspiring to defraud the United States by requiring employees hired with federal funds to contribute five per cent of their salaries to the Governor's political party for use in publishing a political newspaper. The court found that a conspiracy to defeat application of the funds to their statutory purposes was within the statute. Even if the salaries were not excessive, the court concluded the scheme would obstruct administration because efficiency and morale might be lowered. *Id.* 824.

United States v. Pintar, 630 F.2d 1270, 1277-78 (8th Cir. 1980).

In the instant case, Defendant argues that because he allegedly owned no income tax (an allegation the Government vigorously disputes) under the law in effect at that time, he cannot have been guilty of conspiring to defraud the IRS. Defendant's motion gives a thorough recitation of the

evolution of the tax law in question. Essentially, his theory is that because a 1986 amendment and a 1988 amendment to 26 U.S.C. § 1374 applied to the transactions in question, he did not owe any tax and, therefore, did not defraud the IRS and could not have agreed to defraud the IRS. While these amendments have great relevance in the determination of Defendant's restitution amount, this Court believes that Defendant's attempt to use them to cast doubt on his guilt is without merit.[2]

The case law cited above makes is abundantly clear that the Government need only show the existence of an agreement to defraud the IRS and an overt act by one of the conspirators in furtherance of the agreement's objectives or, in other words, that Defendant engaged in a scheme to impair, obstruct, defeat, or interfere with lawful governmental functions through fraudulent or dishonest means. As the

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2. Defendant relies on *United States v. D'Agostino*, 145 F.3d 69 (2d Cir. 1998). In that case, the defendants' convictions for tax evasion were reversed because they actually did not owe the taxes as alleged by the government. *Id.* at 72-73. The Second Circuit also reversed the defendants' convictions for the alleged *Klein* conspiracy because, the court reasoned, if they "did not owe taxes on the diverted corporate income, then they cannot be guilty of defrauding the government *by not reporting the funds* on their personal tax returns." *Id.* at 73 n.6 (emphasis added). Had Defendant's only action in this case been the failure to include a particular class of income on his tax returns, the *D'Agostino* case would be more persuasive. However, in the present case Defendant devised a series of sham transactions and made fraudulent misrepresentations to the bankruptcy court—actions which, unlike those in the *D'Agostino* case, were separate and apart from the filing of a tax return and, therefore, unrelated to the amount of tax owed (or not owed).

Eighth Circuit explained in its opinion, there was an agreement between, at least, Defendant Tucker and his co-Defendant William Marks to impair, obstruct, defeat, and interfere with the collection of taxes by the IRS. Furthermore, numerous overt acts were committed in furtherance of the agreement. To wit, Defendant "devised a series of sham transactions to minimize [his] tax liability" and made "misrepresentations to the bankruptcy court." *Tucker,* 217 F.3d at 961-62. The fact that Defendant and/or his tax attorney may have been mistaken as to the *need* to interfere with the collection of taxes by the IRS because his tax liability was actually lower than he believed does not change the fact that he agreed to interfere and committed fraudulent acts in furtherance of that interference.

Furthermore, even if the Government was also mistaken as to the amount of money it lost as a result of Defendant's actions, the case law is clear that an actual pecuniary loss is not a required element of a *Klein* conspiracy. Part of the confusion on this point stems from the fact that Defendant was not charged with income tax evasion. Had Defendant been charged, this Court might agree that he could not evade a tax law for which he was not liable.[3] However, this is not the case here. Quite simply, Defendant and his co-conspirator(s) agreed to *impair, obstruct, defeat, and interfere* with the collection of taxes by the IRS. Defendant did not plead guilty to evasion of income taxes. Defendant's participation in the sham bankruptcy at the very least impaired and interfered with the lawful function of the IRS. The fact that he may not have needed to so participate does

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3. *See supra* note 2.

not, however, alleviate his guilt. Having found that the record cannot support a claim of actual innocence, this Court must find that this exception cannot excuse Defendant's procedural default.

The Merits Of The Motion

While this Court has found that Defendant's motion is procedurally barred, it will briefly discuss the merits of Defendant's three theories for relief. First, Defendant's claim of legal impossibility is without merit as explained under the section above which discusses actual innocence.

Second, Defendant's claim that his guilty plea was not knowingly entered is without merit. As noted above, "even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review." *Bousley,* 523 U.S. at 621. Defendant made no such challenge in his appeal, nor did he move this Court to withdraw his guilty plea. Furthermore, Defendant's plea agreement as well as his comments during his plea hearing give plenty of evidence of the voluntary and knowing nature of the plea, and, as previously noted, he never moved to set the plea aside.

Third, Defendant's claim that the Government committed a *Brady* violation is without merit. "A knowing and intelligent guilty plea forecloses independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *United States v. Vaughan,* 13 F.3d 1186, 1187 (8th Cir.) (internal quotation omitted), *cert. denied,* 511 U.S. 1094 (1994). As noted above, Defendant's plea was

knowing and intelligent. Therefore, any claims based on the deprivation caused by the alleged *Brady* violation cannot be reviewed.

Therefore, for the reasons stated above, Defendant's Motion To Vacate Sentence Under 28 U.S.C. § 2255 (Doc. No. 341) is DENIED and the motion is DISMISSED WITH PREJUDICE.[4]

IT IS SO ORDERED this 28th day of August 2003.

s/ [illegible]
UNITED STATES DISTRICT JUDGE

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4. Defendant, in his motion, requested a hearing on the motion. "[A]n evidentiary hearing is necessary only where the court is presented with some reason to question the evidence's credibility." *Kingsberry v. United States,* 202 F.3d 1030, 1033 (8th Cir.) (internal quotation omitted), *cert. denied*, 531 U.S. 829 (2000). The statute also makes it clear that a hearing is only necessary when the motion, files, and records of the case do not conclusively show that the movant is not entitled to relief. 28 U.S.C. § 2255. *See also* Fed. R. Governing § 2255 Proceedings 8(a) (stating that a court should "determine whether an evidentiary hearing is required"). This Court does not believe that Defendant's motion makes allegations which necessitate a hearing. The court has rejected each of Defendant's claims on a legal rather than factual basis. Therefore, this Court does not believe a hearing would serve any useful purpose.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING DATED OCTOBER 21, 2005

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03-3559

United States of America,

Appellee,

vs.

Jim Guy Tucker,

Appellant.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judges Arnold, Murphy, and Colloton took no part in the consideration or decision of this matter.

(5128-010199)

October 21, 2005

Order Entered at the Direction of the Court:
s/ [illegible]
Clerk, U.S. Court of Appeals, Eighth Circuit